80-1048

Supreme Court, U. S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CAPTAIN DAVID A. KARLIN,

Petitioner,

vs.

THE HONORABLE HANS M. MARK, SECRETARY OF THE AIR FORCE; COLONEL E. C. APEL, UNITED STATES AIR FORCE, COMMANDER, 924TH TACTICAL AIRLIFT GROUP, BERGSTOM AIR FORCE BASE, AUSTIN, TEXAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Question Presented

Whether the Due Process Clause requires reasons to be given for denial of administrative claims submitted to the Armed Forces and, if so, what is the test to be applied in such cases.

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FOR THE FIFTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and The Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on October 17, 1980, reversing the order of the District Court for the Southern District of Texas, Houston Division granting Petitioner's request for writ of Habeas Corpus.

Opinions Below

The opinion of the District Court is set out in the Appendix, infra, pp. 1a-10a. The opinion of the United States Court of Appeals reversing the judgment of the District Court is unreported. It is set out in the Appendix, infra, pp. 11a-16a. The order of the United States Court of Appeals denying the Petition for Rehearing is set out in the Appendix, infra, p. 17a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 17, 1980, and a timely petition for rehearing was denied on November 12, 1980. This court has jurisdiction under 28 U.S.C. Section 1254(1).

Statutes and Regulations Involved

Department of Defense Instruction 1205.1, paragraph X, section D [App. 36a], provides:

> "X. Ordering Commissioned Personnel to Active Duty
>
> "D. Upon receipt of active duty orders any reserve officer and/or his employer may submit a request for delay in entrance on active duty and/or exemption from active duty to a broad authorized by the military department convened to consider such cases. If such action results in disapproval, when the request is based on alleged community essentiality or hardship, the officer and/or his employer may submit an appeal to a higher authority within the military department concerned for a final determination of the matter."

Air Force Regulation 45-26, paragraph 23 [App. 55a], as amended by Interim Message Changes 77-1 and 78-1 [App. 57a-58a], provides:

> "23. Delays or Exemptions from EAD of Medical and Dental Officers. On receipt of active duty orders, any Reserve medical or dental officer or employer may submit a request for delay in entrance on active duty or exemption from active duty to

AFMPC/SG, Randolph Air Force Base Texas 78148. If disapproved, when the request is based on alleged community essentiality or hardship, the officer or employer may submit an appeal to the Secretary of the Air Force Personnel Council, Washington, D.C. 20330, for a final determination. Such appeals are forwarded through AFMPC/SF, Randolph AFB Texas 78148. Officers of the Medical Service who have an obligation to serve on active duty as a result of receiving financial assistance from the Air Force for undergraduate or graduate school are not eligible to apply under this paragraph. Criteria used to determine community essentiality is as follows:

"a. The services performed by the physician are essential to the maintenance of the health, safety, or welfare of the community.

"b. Removal of this physician from the community would result in an extreme shortage or elimination of an especially critical community service.

"c. The service cannot be performed by other persons residing in the area concerned.

"d. The physician cannot be replaced in the community by another

physician who can perform such service within the time allotted by a postponement of entry on active duty.

"e. The physician will be ruled not essential to a community where he or she has never practiced.

"f. The needs of the civilian community must be balanced against the needs of the military service.

Statement of the Case

The Petitioner [hereinafter referred to as "Karlin") was commissioned a First Lieutenant in the Air Force Reserve on November 24, 1970 under an Armed Forces program to procure medical specialists. Karlin received no financial aid whatsoever.

As provided under the program through which Karlin was commissioned, he was granted delays from active duty to complete residency training as a medical specialist in internal medicine. Upon completion of his basic specialty training, Karlin requested and was granted additional delays from entry on active duty to complete further training in the sub-specialties of oncology and gastroenterology.

During 1976, Karlin was employed at the University of Chicago Medical School and Hospital, Chicago, Illinois, in the conduct of clinical

research in cancer chemotherapy and treatment of cancer patients. He submitted a resignation of his commission to the Air Force on the grounds of the essential nature of his employment to the community wherein he practiced medicine, and to the nation as a whole. The Air Force refused to accept Karlin's resignation, whereupon Karlin began legal proceedings, not relevant to this Petition except to be extent that Karlin obtained further delay of completing his two years active duty commitment with the Air Force.

During 1978, Karlin obtained an appointment as a gastroenterologist-oncologist (a specialist in stomach cancer and a sub-specialty of internal medicine) at the M. D. Anderson Hospital and Tumor Institute, Houston, Texas. Karlin was concurrently employed as an instructor in his medical specialty at The University of Texas School of Medicine, Houston, Texas. Karlin was issued new active duty orders by the Air Force on January 22, 1979, directing Karlin to report for his two years active duty with the Air Force on March 28, 1979.

On December 4, 1978, Karlin again submitted a resignation of his commission to the Air Force on the grounds of the essential nature of his work in the civilian community. The Air Force convened a board of officers to consider Karlin's resignation. On March 16, 1979 this Board rejected Karlin's claim on the grounds that Air Force needed Karlin more than the M. D. Anderson Hospital and Tumor Institute and The University of Texas School of Medicine in Houston, Texas.

Karlin appealed the decision of this board, supplementing his additional application with documents evidencing the extraordinary need for him as a medical specialist in the the Houston, Texas area. On June 25, 1979, the Air Force appellate administrative board denied Karlin's appeal, which was affirmed by the Secretary of the Air Force. The notification to Karlin of this action merely stated that Karlin's application was denied based upon the recommendation of the Air Force Personnel Board.

On June 29, 1979, Karlin filed a petition for writ of habeas corpus; injunction; and declaratory judgment in the United States District Court for the Southern District of Texas. Federal jurisdiction was claimed under 28 U.S.C. 2241, 28 U.S.C. 1361, 28 U.S.C. 1651, and 28 U,S.C. 2201/2202.

Following a trial before the District Court, sitting without a jury, at which testimony was adduced and the administrative record was considered, the Court issued a judgment, filed October 11, 1979, Appendix, infra, pp. 1a-8a, granting Karlin's motion for a writ of habeas corpus. The Air Force appealed and the trial court's decision was reversed by the Court of Appeals on the grounds that the District Court had impermissibly substituted its judgment for the judgment of the Secretary of the Air Force, prohibited by the case law of the United States Court of Appeals for the Fifth Circuit, Specifically as set forth in Nicholson v. Brown, 599 F.2d 639 (5th Cir. 1979), Appendix, infra, pp. 9a-14a, the Court of Appeals denied Karlin's petition for rehearing, Appendix, infra, p. 15a, but, on December 2, 1980 granted a stay of mandate to and including January 2, 1981 to allow this petition for writ of certiorari to be filed.

WHY THE WRIT SHOULD BE GRANTED

This case raises issues far beyond and more fundamental to the rights of military personnel than mere consideration of the rights of physicians who apply for deferment or exemption from military service based on their extraordinary value to the communities wherein they practice. The military draft appears likely to be renewed in the near future.

The current state of case law pertaining to Due Process of Law to be accorded to military personnel making administrative claims to the Armed Forces is in a state of disarray and conflict. Because of the voluminous litigation involving conscientious objection, the "basis in fact" test, established by this court in Estep v. United States, 327 U.S. 114 (1946) has been well established. However, an application for conscientious objector status is only one type of administrative claim submitted to the Armed Forces by their personnel.

On those military cases involving only the Due Process legally required to be accorded to physicians, such as Karlin, who apply for exemption or deferment on the grounds of community essentiality, there is a difference in the test used among the circuits. Miller v. Claytor, 466 F. Supp. 938 (N.D. Cal. 1979) at 940 sets out in detail the conflict in the standard of judicial review in these cases. In West v. Chafee, 560 F.2d 942 (8th Cir. 1977) at 945, the court rejected cases involving conscientious objection as

applicable to other administrative actions by the Armed Forces, such as Sanger v. Seamans, 507 F.2d 814 (9th Cir. 1974); Chilgren v. Schlesinger, 499 F.2d 204 (8th Cir. 1974); Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1978). Yet in Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978) at 860 and fn. 18, the District of Columbia Circuit cites Sanger v. Seamans, supra, as well as United States ex rel. Checkman v. Laird, 469 F.2d 773 (2nd Cir. 1972) at 779-83, 787, both conscientious objector cases, as authority for holding in favor of a petitioner. Matlovich involved, not conscientious objection or alleged community essentiality of a physician, but the Due Process of Law to be accorded homosexuals discharged involuntarily by the Armed Forces. The Matlovich court cited with approval, the decision in United States ex rel. Checkman v. Laird, supra, to the effect that when a military official has the power to find in favor of an applicant, material submitted must be considered and if the applicant is denied, reasons must be stated with support found in the administrative record.

Sanger v. Seamans, supra, involved a decision by the Air Force Personnel Board as does Karlin's case. The Ninth Circuit in Sanger, at 507 F.2d 818, contra to the Fifth Circuit in the instant cause, held that without the record of the Air Force Personnel Board, a judicial determination could not be made as to whether there was a basis in fact for the adverse decision by the Armed Forces.

In yet another type case, frequently litigated and involving the Armed Forces, those involving claims for money in the United States Court of Claims, the issue has arisen as to whether reasons for military decisions are required. For example, in Buchanan v. United States, 621 F.2d 373 (Ct.Cl. 1980) the Court of Claims relied upon Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) to hold in favor of a military petitioner to the Court of Claims on the grounds that the Military Correction Board denied relief without explanation.

CONCLUSION

As shown by the foregoing argument, cases involving decisions by the Armed Forces on administrative applications, excepting only conscientious objector claims, have been decided under a variety of judicial tests and upon a variety of theories as to whether reasons must be furnished applicants who are denied and in what amount of detail. For these reasons the petition for certiorari should be granted.

Respectfully submitted,

RICHARD P. FOX

Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

U.S. District Court
Southern District of Texas
F I L E D
Oct 11 1979
M. Bailey Thomas, Clerk
By Deputy /s/ P. Robinson

CAPTAIN DAVID A. KARLIN, U.S.A.F.R.	§	
VS.	§	CIVIL ACTION
THE HONORABLE DR. HANS M. MARK, THE SECRETARY OF THE AIR FORCE; COLONEL E. C. APEL, U.S.A.F. COMMANDER, 924TH TACTICAL AIR LIFT GROUP, BERGSTROM AIR FORCE BASE, AUSTIN, TEXAS	§	NO. H-79-1337

FINAL JUDGMENT

This cause comes before the Court requiring a review of an administrative decision by the Air Force Personnel Council, as adopted by the Secretary of the Air Force, denying the Plaintiff's application for an exemption from active duty. Having considered the pleadings, together with the record of the proceedings before the Air Force Personnel Council, the transcript of the hearing before this Court, and the memoranda of law submitted by the parties, and

It appearing to the Court, based upon the reasons stated in this Court's Memorandum and Order of October 10, 1979, that the Secretary's decision should be vacated and the Plaintiff's request for a Writ of Habeas Corpus should be granted, it is, therefore,

ORDERED, ADJUDGED and DECREED that the said decision of the Secretary be, and is hereby reversed, and that Plaintiff's motion for a Writ of Habeas Corpus be GRANTED.

Signed this 11th day of October, 1979.

/s/ Robert O'Conor, Jr.
ROBERT O'CONOR, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

U.S. District Court
Southern District of Texas
F I L E D
Oct 10 1979
W. Bailey Thomas, Clerk
By Deputy /s/ P. Robinson

CAPTAIN DAVID A. KARLIN, U.S.A.F.R.	)	
	)	CIVIL
vs.	)	ACTION
	)	NO.
THE HONORABLE DR. HANS M. MARK, THE SECRETARY OF THE AIR FORCE; COLONEL E. C. APEL, U.S.A.F., COMMANDER, 924TH TACTIFAL AIR LIFT GROUP, BERGSTROM AIR FORCE BASE, AUSTIN, TEXAS	)	H-79-1337

MEMORANDUM AND ORDER

This cause of action comes before the Court in the form of a review of an administrative decision by the Secretary of the Air Force Personnel Council denying the Plaintiff's application for an exemption from active duty on the grounds of community essentiality.[1] Captain Karlin's petition requests

[1] Briefly stated, participants in the armed services' "Berry Plan", including Dr. Karlin,

(continued on 4a)

this Court to grant him relief, alternatively, by issuing a Writ of Habeas Corpus, Permanent

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[1] (continued from previous page)
were allowed to defer their active military service pending completion of their medical training. Dr. Karlin received no financial support from the Air Force as a result of his participation in the plan, but did receive a deferment from active duty. The complete factual setting concerning Captain Karlin's request for an exemption from active duty is set out in Karlin v. Reed, 584 F.2d 365 (10th Cir. 1978). The case is reviewable by this Court pursuant to 28 U.S.C. §2241 (1970). See Nicholson v. Brown, No. 771782, slip. op. at 6481 (5th Cir., July 26, 1979); United States ex rel. Hutcheson v. Hoffman, 439 F.2d 821, 824 (5th Cir. 1971). The six factors used by the Air Force Reviewing Board to determine whether a physician is so "essential to the community" as to warrant granting that physician an exemption from active duty are as follows:

1. The services performed by the physician are essential to the maintenance of the health, safety or welfare of his community.

2. The removal of this physician from the community would result in an extreme shortage or elimination of an especially critical community service.

3. The service cannot be performed by other persons residing in the area concerned.

4. The physician cannot be replaced in the community by another physician who can perform such service within the time allotted by a postponement of entry onto active duty.

(continued on 5a)

Injunction, Mandamus, or a Declaratory Judgment. As a basis for that relief, Captain Karlin alleges that his services as a gastroenterologist/oncologist[2] at M. D. Anderson Tumor Institute in Houston, Texas are more essential both to the Houston area, and more beneficial to the United States as a whole, than the services he could render at any Air Force facility. The Government, in response, argues that, under the standard of review announced in Nicholson v. Brown, No. 77-1782 (5th Cir., July 26, 1979) the decision by the Air Force should be sustained as having an adequate "basis in fact".[3]

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[1] (continued from previous page)

5. The physician will be ruled not essential to a community where he has never practiced.

6. The needs of the civilian community must be balanced against the needs of the military service.

See Reserve Medical and Dental Officer Delay and/or Exemption From Active Duty Board Minutes (March 16, 1979) (attached as Item 14 to Government's Exhibit 1 in the record).

[2] "Gastroenterology" is the study, care, and treatment of diseases of the gastrointestinal tract. "Oncology" is the study of cancer. Dr. Karlin specializes, then, in the study, care and treatment of cancer as it affects the gastrointestinal tract.

[3] The government, in its Supplemental Memorandum of Points and Authorities in Response to Petitioner's Traverse, advances several preliminary matters. The first of these involves whether this case is properly before this Court, arguing that

(continued on 6a)

In analyzing whether the Secretary's decision in the instant case can stand under the "basis in fact" test, the Fifth Circuit's explanation of that test in Nicholson is useful:

> The 'basis in fact' test reiterated here essentially does not differ from review based on 'arbitrariness' as established in other circuits (citing cases) .... No great mischief is done so long as the 'basis in fact' test is used not as an ultimate test but as a tool in determining whether a determination is arbitrary or capricious. If, for example, the military reviewing

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[3](continued from previous page)
Dr. Karlin failed to exhaust his administrative remedies. While the Fifth Circuit generally has held that one must exhaust her or his administrative remedies prior to seeking judicial review of an administrative determination, e.g. Hodges v. Callaway, 499 F.2d 417, 421, 423-24 (5th Cir. 1974); Mindes v. Seamans, 453 F.2d 197, 201 (5th Cir. 1971), the Appellate Court also has recognized the right of one to secure review of military personnel decisions for arbitrariness in precisely this type of case. Nicholson v. Brown, No. 77-1782 at 6479-81 (5th Cir. 1979) (citing White v. Callaway, 501 F.2d 672 (5th Cir. 1974) and United States ex rel. Hutcheson v. Hoffman, 439 F.2d 821 (5th Cir. 1971)). This Court is of the view that this case merits review under the standards announced in Nicholson. The government's other preliminary matters are rendered moot by the holding in this case.

> authorities rest the denial of an exemption request on a factual determination that is completely contrary to the facts as they appear in the applicant's file, the determination could be overturned as arbitrary because lacking a basis in fact. The basis in fact test oversteps its proper function, however, when it is used to overturn a decision that rests on assertions of fact that are not contradicted by the evidence in the applicant's file but that simply lack support in record evidence ....

Slip Op. at 6481 n. 8. Essentially, then, the Secretary's decision must be upheld unless the facts in the applicant's file contradict the factual determination upon which the Secretary's decision rests and as a result, render that decision arbitrary.

The Secretary's decision not to exempt Dr. Karlin from active duty turned on the determination that the needs of the M. D. Anderson community, which Dr. Karlin showed to be substantial at the administrative level and at trial, were outweighed by those of the Air Force. The Air Force Board that reviewed Dr. Karlin's application found that the need for a gastroenterologist/oncologist was similarly substantial at the Malcom Grow USAF Medical Center and that Dr. Karlin would uniquely fill that need. This Court, however, believes the balancing of the relative needs of the community and the Air Force inescapably leads to the conclusion that the needs of the community override those of the

Air Force and, hence, the Secretary's decision must be vacated as being arbitrary and the Writ of Habeas Corpus granted.

A proper evaluation of the Secretary's decision cannot be made without examing the medical community with which Dr. Karlin is now associated. The treatment of cancer is inextricably linked to research. No cure has been found for this disease and, therefore, each case presents an important new and different set of circumstances for evaluation by the treating physician. Only if physicians like Dr. Karlin are given the facilities to conduct thorough research upon the causes and effects of cancer will the medical community be able effectively to combat this disease. The M.D. Anderson Tumor Institute is recognized as one of the leading, if not the leading, cancer research facilities in the world. This institute, and the physicians who staff it, are the cutting edge of the medical profession's effort to curb the onslaught of cancer. Notwithstanding M.D. Anderson's established reputation, however, the acquisition of a subspecialist like Dr. Karlin represented an important addition to the M.D. Anderson staff, as the testimony of Dr. Thomas P. Haynie, Head of the Department of Medicine at the M.D. Anderson Hospital, amply demonstrated. Even an institution like M.D. Anderson encounters difficulty in securing doctors who are willing to forego the lure of the substantially higher monetary rewards of private practice in order to devote their energies to research. Dr. Karlin is one of those doctors who has elected not to pursue those lucrative financial fields. Without his continued work at M.D. Anderson, most of the research programs initiated and conducted by him will have

to be indefinitely suspended. In his present capacity, he is both essential to and uniquely suited for the needs of the M.D. Anderson medical community.

The testimony of Colonel Briccerti[4] at trial was that the Malcom Grove Medical Center in Washington, to which Dr. Karlin was to be assigned, is "analogous to a middle class community hospital in most parts of the country." Tr. at 71. Further Colonel Briccetti testified that Malcom Grove had no capability for laboratory research. In short, all the record testimony directly or indirectly establishes that the facilities at Malcom Grove, as well as Malcom Grove's cross section of patients to a certain extent, do not present the fertile research ground so essential to the work of a physician of Dr. Karlin's particular expertise and professional training -- especially when compared with the facilities at M.D. Anderson. No doubt exists that Dr. Karlin would be valuable to any medical community; however, his value to the M.D. Anderson facility and the medical community it serves unquestionably surpasses the value he would have in any other medical environment. The therapy protocols which are the result of Dr. Karlin's research could be disseminated througout the United States and the world if successful. The loss of Dr. Karlin to the M.D. Anderson Institute severely would hinder its research activity and would, of course, secondarily affect the medical community as a

[4] Chairman of the Department of Medicine at the Malcom Grove Medical Center at Andrews Air Force Base.

whole. Given the evidence presented, this Court (1) cannot imagine a more pronounced need for a physician like Dr. Karlin to practice in the medical community he now serves and (2) must conclude that the Secretary's decision in this matter is arbitrary as having no "basis in fact".

It is therefore ORDERED, ADJUDGED and DECREED that the Plaintiff's petition for a Writ of Habeas Corpus is hereby GRANTED and the Secretary of the Air Force is hereby ordered to discharge the Plaintiff from his two-year obligation to serve active duty in the Air Force at this time.[5]

/s/ Robert O'Conor, Jr.
ROBERT O'CONOR, JR.
United States District Judge

[5] The Court declines to dispose of the issues that may be presented if Dr. Karlin leaves M.D. Anderson in the immediate future or if the United States enters a state of National Emergency.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Unit A

No. 79-3975

CAPTAIN DAVID A. KARLIN,
U.S.A.F.R.,

Plaintiff-Appellee,

vs.

THE HONORABLE HANS M. MARKS,
Secretary of the Air Force,
ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(OCTOBER 17, 1980)

Before THORNBERRY, RANDALL and TATE, Circuit Judges.

PER CURIAM:

Captain David A. Karlin, U.S.A.F.R., commenced this action on June 29, 1979, when he filed in the United States District Court for the Southern District of Texas a Petition for

Writ of Habeas Corpus; Injunction; Declaratory Judgment; and an Application for Temporary Restraining Order. Karlin sought relief in the nature of a writ of habeas corpus directing his honorable discharge from the United States Air Force or, in the alternative, further deferment from active duty on the grounds of community essentiality. As a basis for the relief which Karlin requested, he alleged that his services as a gastroenterologist-oncologist at M.D. Anderson Hospital and Tumor Institute in Houston, Texas, were more essential to the Houston area, and more beneficial to the United States as a whole, than the services he could render as a gastroenterologist-oncologist at Malcolm Grow U.S.A.F. Medical Center at Andrews Air Force Base or in the Air Force generally. The Secretary of the Air Force, in response, argued that, under the standard of review set forth in Nicholson v. Brown, 599 F.2d 639 (5th Cir. 1979), the decision of the Air Force, to the effect that Karlin had established that he was needed in his community but that the needs of the Air Force for his services were greater, should be sustained as having an adequate basis in fact. The district court, after setting forth clearly the test announced in Nicholson, concluded that "the balancing of the relative needs of the community and the Air Force inescapably leads to the conclusion that the needs of the community override those of the Air Force and, hence, the Secretary's decision must be vacated as being arbitrary and the Writ of Habeas Corpus granted." In reaching this conclusion, the district court focused on the critical role of research in finding a cure for cancer, on Karlin's research activities at M.D. Anderson and on the absence of research facilities at Malcolm Grow Medical Center.

On appeal, the Secretary of the Air Force argues that the district court overstepped the limits of its review authority in the following respects:

(1) the district court disregarded uncontradicted factual determinations concerning Air Force needs for a gastroenterologist-oncologist which were part of the record before the Secretary and were the basis for the Secretary's conclusion that, on balance, the Air Force's needs were greater; and

(2) the district court, having disregarded the factual basis relied on by the Secretary in weighing the relative needs of the military and civilian communities, substituted its own judgment for that of the Secretary on this balancing factor and concluded that the Secretary's decision was arbitrary as lacking a basis in fact.

We agree with the district court and the Secretary that the standard of review to be applied in cases involving applications for exemption from active duty on the grounds of community essentiality is the standard set forth in Nicholson, i.e., military personnel decisions in community essentiality cases are reviewable only for arbitrariness. The task of the district court is to consider the record which was before the Secretary and to determine whether that record reveals an adequate basis in fact to support the Secretary's determination. In this case, the materials in Karlin's file which were before the Secretary amply demonstrate that the Secretary was not arbitrary in making his determination that, on balance, the

Air Force's needs for Karlin's services were greater than the needs of Karlin's community. The Reserve Medical and Dental Officer Delay and/or Exemption from Active Duty Board, which was convened on March 16, 1979, to consider Karlin's application for exemption or further deferment, and the Secretary, who reviewed Karlin's file on appeal, both determined that Karlin had established that he was needed in his community. However, based on the Air Force needs, which are clearly set forth in the minutes of the Board's proceeding, [1] a determination was made at both levels that the Air Force's needs were greater. The district court disregarded the Air Force's needs, as spelled out in those minutes, and substituted its own conclusion on the "balancing" factor for that of the Secretary. This amounts to the "judicial second-guessing of military personnel decisions" proscribed by Nicholson.

We hold that the record before the Secretary contains an adequate basis in fact for the Secretary's determination, and we reverse the judgment of the district court. Our decision in favor of the Secretary on this issue makes it unnecessary to deal with the other arguments raised by the Secretary on appeal, and we decline to do so.

REVERSED.

FOOTNOTES

1. The minutes of the Board proceeding state that Karlin "would be fulfilling an urgent need for a gastroenterologist/oncologist. The Air Force is currently projecting 73% manning in the Gastroenterology field. Specifically at Malcolm Grow U.S.A.F. Medical Center, there would be no internist trained in gastroenterology for two authorizations without Doctor Karlin's services. This staffing situation would continue through the summer of 1980."

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 79-3975

D. C. Docket No. H-79-1337-CA

CAPTAIN DAVID A. KARLIN, U.S.A.F.R.,
Plaintiff-Appellee,

versus

THE HONORABLE HANS M. MARKS, Secretary of the Air Force, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before THORNBERRY, RANDALL and TATE, Circuit Juges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged oy this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that plaintiff-appellee pay to the defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.

October 17, 1980

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3975

U.S. Court of Appeals
F I L E D
Nov 12 1980
Gilbert F. Ganucheau
Clerk

CAPTAIN DAVID A. KARLIN,
U.S.A.F.R.,

Plaintiff-Appellee,

versus

THE HONORABLE HANS M. MARKS,
Secretary of the Air Force,
ET AL.,

Defendants-Appellants.

- - - - - -

Appeal from the United States District Court
for the Southern District of Texas

- - - - - -

ON PETITION FOR REHEARING
(November 12, 1980)

Before THORNBERRY, RANDALL and TATE,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
/s/ Carolyn -- Randall
United States Circuit Judge

APPENDIX "A"

Number 1205.1
Date September 27, 1960

ASD(H&M)

DEPARTMENT OF DEFENSE INSTRUCTION

Subject Implementation of the Universal Military Training and Service Act with Respect to Medical and Dental Registrants

Refs.:
(a) DoD Instruction 1205.1, "Implementation of the Universal Military Training and Service Act with Respect to Medical, Dental and Allied Specialist Registrants" September 16, 1957 (hereby cancelled)
(b) DoD Instruction 1120.2, "Armed Forces Reserve Medical Officer Commissioning and Residency Consideration Program"
(c) DoD Directive 1120.3, "Report on Medical, Dental, and Allied Specialists, Estimated Monthly Strengths"
(d) DoD Instruction 1120.5, "Armed Forces Reserve Dental Officer Commissioning Program"

I. PURPOSE

The purpose of this instruction is to implement those provisions of the Universal Military Training and Service Act, as amended, and other pertinent laws and

directives which relate to medical and dental specialist personnel registered thereunder who have a liability for training and service (hereinafter referred to as "medical registrants") under the provisions of Section 4 of the Universal Military Training and Service Act.

II. CANCELLATION

Reference (a) is cancelled.

III. THE EXECUTIVE AGENT

A. The Department of the Army is designated as the executive agent for the Department of Defense with respect to certain matters of personnel administration pertaining to medical and dental registrants who apply for commissions after receipt of induction notices.

B. The following functions will be performed by the executive agent:

1. Determining acceptability of medical and dental registrants for military service in accordance with the policies contained in IV. and VI. below.

2. Notify the Selective Service System regarding determinations made pursuant to 1., above.

3. Making departmental allocations of medical and dental registrants ordered for induction. Such allocations will be made in consultation with representatives of the other military departments participating in the special draft call concerned. In the event of a failure to reach agreement during such consultations at an Army area headquarters, the case in question will be referred to the executive agent who will consult with the department concerned prior to resolution. In making allocations due regard will be given to the military department in which the registrant may have had prior service, to the choice of service if specified, and to effect an equitable distribution of registrants from the standpoint of physical and professional qualifications. The number of registrants in each category to be allocated to each of the services from a given special call will be based upon the number of such persons requisitioned for each service by the Department of Defense in that call.

IV. PROFESSIONAL STANDARDS

A. Medical. A medical registrant will be considered professionally acceptable if he is engaged in the ethical practice of medicine or is otherwise participating

in appropriate professional activities and:

1. He is a graduate of a school of medicine approved by the American Medical Association, or,

2. If a graduate of a foreign medical school, he presents evidence of:

   (a) Permanent certification by the Educational Council for Foreign Medical Graduates, or

   (b) Permanent and unrestricted licensure in a state, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States.

Exceptions may be made to the foregoing policy if a registrant possesses exceptional professional qualifications of value to the Armed Forces.

B. Dental. A dental registrant will be considered professionally acceptable if he is engaged in the ethical practice of dentistry and --

1. He is a graduate of a dental school approved by the Council on Dental Education of the American Dental Association, or --

2. He is currently licensed to practice dentistry in a state, the District of

Columbia, the Commonwealth of Puerto Rico, or a territory of the United States.

Exceptions may be made to the foregoing policy insofar as engagement in the ethical practice of dentistry is concerned if a dental registrant's case is being considered within one year after graduation from an approved dental school or while he is undergoing postgraduate instruction.

V. MEDICAL FITNESS STANDARDS

A. The nature of the duties expected of physicians and dentists is such that, although they may have physical defects or medical conditions which would ordinarily be cause for rejection for the various branches and services of the Armed Forces, they may be expected to perform appropriate military duties as physicians and dentists.

B. The policy referred to in A., above, permits the evaluation of certain physicians and dentists, who would generally be classified as medically unacceptable because of physical findings such as absence of parts, static orthopedic defects, the requirement of maintenance medication, the statis sequelae of arrested acute and chronic disease processes, defective visual and auditory acuity, and some

active processes relatively asymptomatic or of which the symptoms are not essentially disabling. Evaluations will be made on an individual basis and special attention will be given to those in whom health factors may be affected by age.

C. The medical fitness standards set forth herein are applicable both in determining whether those persons who are commissioned or enlisted are qualified for active duty, except that no medical or dental registrant will be found acceptable for induction if he is, or has been, rejected for appointment as a Reserve medical or dental officer on the sole ground of physical disqualification.

D. The name of any applicant for appointment as a Reserve officer in the Medical or Dental Corps in one of the Armed Forces who is under the age of 35 and has been rejected for a Reserve commission on the sole ground of physical disqualification will be furnished, together with one copy of the SF 88, to the executive agent named in paragraph III. A. for transmittal to the State Director of the Selective Service System. A determination by one of the Armed Forces that an applicant is disqualified solely for physical reasons shall be conclusive as to the other departments.

VI. MORAL STANDARDS

A. A medical or dental registrant will be found not acceptable for military service if he has:

1. Been convicted by a civil court of any offense where total sentence, period of parole, probation, suspended sentence or any other form of civil restraint exceeds one year or of any offense punishable by death.

2. Had frequent difficulties with law enforcement agencies or has exhibited criminal tendencies, a history of anti-social behavior, alcoholism, drug addiction, or other traits of character which would render him unfit to associate with military personnel.

3. Previously been separated from one or more of the Armed Forces under other than honorable conditions or for the good of the service concerned.

4. Criminal charges filed and pending against him, alleging a violation of a state or federal statute.

VII. PROCESSING OF REQUIREMENTS

A. The report, "Medical, Dental and Allied Specialists, Estimated Monthly Strengths" (DD H&M(Q) 130) (DD Forms 574 and 574-1) submitted by the military departments in accordance with Department of Defense Directive 1120.3 (Reference (c)) will, after processing within the Office of the Secretary of Defense, be referred to the Assistant Secretary of Defense (Health and Medical).

B. The figures shown under column f, of the report referred to in A., above, will be the number of registrants in the various professions to be requisitioned from the Selective Service System under the provisions of subsection 5(a), Universal Military Training and Service Act, as amended, for a particular military department. Any significant change in the number of personnel required by a military department from the Selective Service System occurring during the period between regular submission of the reports referred to in A., above, will be reported to the Assistant Secretary of Defense (Health and Medical) by memorandum stating the changes desired and the reasons therefor. Such reports will be rendered at least forty-five days in advance of the first of the month in which the call is to be effective.

C. In making entries in column f of the report referred to above, the military departments are authorized to use an experience factor based upon previous deliveries by the Selective Service System. In no instance, however, will such action serve as a basis for exceeding authorizations.

D. The Assistant Secretary of Defense (Health and Medical) will, after further coordinating the reports referred to in A., above, with the Assistant Secretary of Defense (Manpower, Personnel and Reserve), submit such reports to the Secretary of Defense for approval.

E. The Assistant Secretary of Defense (Manpower, Personnel and Reserve) will place approved calls with the Selective Service System. Calls will be placed with the Selective Service System at such intervals as will permit medical and dental registrants who accept reserve commissions in lieu of induction to be called to duty normally not less than forty-five days and no more than 120 days following their induction dates.

VIII. COMMISSIONING OF MEDICAL AND DENTAL REGISTRANTS

A. Qualified medical and dental registrants may be commissioned by a military department upon receipt of an application for such appointment as indicated in this section.

B. An applicant for a commission in one service who under the provisions of Section III.B.3. has been allocated for commissioning purposes to another service may not be commissioned in the first service except upon the approval of the Assistant Secretary of Defense (Health and Medical) or upon the applicant's release by the latter service.

C. Persons ordered for induction and allocated to the service concerned and medical and dental students who are participants in one of the early commissioning programs conducted by the military departments, or who were originally commissioned as a result of completing a reserve officer training corps program and who accept appointment as medical or dental officers upon graduation, may apply for a commission at any time. In order to implement the Armed Forces Reserve Medical Office Commissioning and Residency Consideration Program (Reference (b)) and the Armed Forces Reserve Dental Officer Commissioning Program (Reference (d)), applications from medical and dental registrants may not be accepted from individuals in the categories below until expiration of the indicated period of time:

1. Medical registrants who did not participate in the Armed Forces Reserve Medical Officer

Commissioning and Residency Consideration Program may not apply prior to March 1 of the year following the registrant's graduation from medical school.

2. Medical registrants who participated in the Armed Forces Reserve Medical Officer Commissioning and Residency Consideration Program may apply only to the military department to which allocated prior to March 1 of the year following the registrant's graduation from medical school.

3. Dental registrants who did not participate in the Armed Forces Reserve Dental Officer Commissioning Program may not apply within the 4-month period following the registrant's graduation from dental school.

4. Dental registrants who participated in the Armed Forces Reserve Dental Officer Commissioning Program may apply only to the military department to which allocated within the 4-month period following the registrant's graduation from dental school.

D. A medical registrant who holds a commission in a Reserve component in one of the Armed Forces except those holding commissions in the federally recognized National Guard of the Army

or Air Force will not be required to participate in Reserve training programs while he is:

1. Undergoing a one-year medical internship, or

2. Undergoing residency training under Reference (b).

E. Determination of rank.

1. Upon determination by the service concerned that they are qualified for a commission, medical and dental registrants will be appointed in the Army or the Air Force in grades as follows, based upon the number of years' service constructively credited under 2., below, unless they are eligible for higher grade under other provisions of law or directive.

Years of Service	Grade
Less than 7 years	First Lieutenant
7 or more but less than 14 years	Captain
14 or more but less than 21 years	Major
21 or more but less than 23 years	Lieutenant or Lieutenant Colonel as determined by the military department
*23 or more years	

*Persons who have achieved national prominence as authorities in their particular specialty may be appointed in the grade of Colonel.

2. Years of service for appointment purposes under 1, above, will be computed by crediting the registrant with a minimum of four years for graduation from medical or dental school and adding an amount equivalent to the number of years, months, and days in which he has been engaged in appropriate professional activities between the date of his graduation and date of appointment except that each year of professional experience in excess of 21 years will be given one-half credit in determining his years of service. In addition, a person who possesses degrees in both medicine and dentistry may, in exceptional circumstances when it is determined by the service concerned that the additional training and experience which he possesses is of value in the profession in which he is then participating, be awarded not more than three years' additional credit toward determination of his credit. Nothing in the foregoing will be construed to prevent a military department from awarding credit in excess of that provided in this paragraph to an individual who has prior military service or possesses other qualifications for which credit may be authorized under current law.

3. Medical and dental officers on active duty in the Army or Air Force in the grade of first lieutenant shall be promoted to the temporary grade of captain if otherwise qualified therefor on the day following the first anniversay of the date upon which graduated from medical or dental school, if not entitled to prior promotion under other provisions of law or regulations.

4. In determining the grade in which medical and dental officers of the Navy shall be appointed constructive service shall be computed, considering professional education, professional experience gained subsequent to graduation from medical or dental school while not on active duty, and professional experience gained while on active duty as a medical officer or dental officer, as follows:

Four years' constructive service shall be credited for professional education prior to graduation from a medical school or dental school. Professional experience gained during the first two years after such graduationshall be credited as constructive service on a day-for-day basis. Active duty professional experience gained subsequent to two years after such graduation shall also be credited on a day-for-

day basis. In addition, constructive service for professional experience gained subsequent to two years after such graduation while not on active duty shall be credited according to the following table:

Non-Active Duty Professional Experience Subsequent to 2 Years after Graduation	Constructive Service
0 - 8 years	3/4 of non-active duty professional experience
Over 8 years	6 years plus 6/7 non-active duty professional experience in excess of 8 years

Upon determination of constructive service, an applicant may be appointed in the same grade and with the same date of rank as a line officer who was originally appointed in the grade of ensign and has not lost numbers on the lineal list of the Navy, and who has, or is expected to have, on the date of appointment of the applicant, actual commissioned service equal to the constructive service of the applicant, provided that an applicant will not be appointed in the grade of captain with date of rank earlier than 1 July 1955. If there be no such line officer, the

grade and the date of rank assigned the applicant shall be the same as that held by the line officer whose service is most nearly equal to but not less than the constructive service of the applicant. The line officer so determined shall be assigned as the running mate of the applicant when appointed and, if there be more than one such line officer, the most junior shall be assigned. If the running mate who is assigned to the applicant is on the promotion list to the next higher grade, the applicant shall be appointed in the lower grade and promoted when his running mate is promoted.

F. Oath of Officer for Certain Non-citizens.

In the event that a non-declarant alien while being processed for a commission indicates that he does not desire to take the oath of allegiance prescribed by Section 1757 of the Revised Statutes, as amended, he may pursuant to subsection 5(a), Universal Military Training and Service Act, as amended, be administered the following oath of service and obedience:

"I _____, a citizen of _____, and without intention of surrending such citizenship, having been appointed a _____, do solemnly swear (or affirm) that I will serve the

United States against all their enemies whomsoever, and that I will honestly and faithfully discharge the duties of the officer upon which I am about to enter; So Help Me God."

G. Appointment without Referal to a Board of Officers.

Pursuant to subsection 5(c), Universal Military Training and Service Act, as amended, any person who is otherwise qualified for appointment in a grade higher than major or lieutenant commander will be appointed in such grade without referral of his case to a board of officers convened by the Secretary of the service concerned.

IX. READJUSTMENT OF GRADES OF CERTAIN OFFICERS

A. Any physician or dentist who is a member of a Reserve component will, upon being ordered to active duty, be reappointed or promoted to such higher grade as he is entitled to under the provisions of this instruction based upon the amount of his creditable service or professional experience computed to the time of entry on active duty.

B. Any physician or dentist serving on active duty who has accrued any amount of professional experience which, were he being considered for appointment pursuant to Section VIII.E.,

above, would entitle him to a higher grade than that in which he is serving on active duty will, at the earliest practicable date, be appointed or promoted (if otherwise qualified) to such higher grade.

X. ORDERING COMMISSIONED PERSONNEL TO ACTIVE DUTY

A. Any physician or dentist who is a member of a reserve component of one of the Armed Forces, who has not attained his 35th birthday, and who has not performed at least one year of active duty (other than for training), exclusive of periods spent in student programs prior to receipt of the appropriate professional degree or in intern training, may be ordered with or without his consent to active duty (other than for training) as an individual for a period of not more than 24 months pursuant to subsection 4(1), Universal Military Training and Service Act, as amended.

B. Except for participants in the Armed Forces Reserve Medical Officer Commissioning and Residency Consideration Program and members of Ready Reserve units who are actively participating in unit training, persons subject to this section, in the event of a special draft call, will be ordered to active duty at the approximate time they would have been ordered for induction by the Selective Service System had they not

been members of a reserve component of the Armed Forces.

C. Those physicians and dentists who were members of the National Guard of the United States on 25 June 1950 and who have been members continuously since that date will not be called to active duty as individuals without their consent.

D. Upon receipt of active duty orders any reserve officer and/or his employer may submit a request for a delay in entrance on active duty and/or exemption from active duty to a board authorized by the military department concerned to consider such cases. If such action results in disapproval, when the request is based on alleged community essentiality or hardship, the officer and/or his employer may submit an appeal to a higher authority within the military department concerned for a final determination of the matter. *

E. Any physician or dentist who meets the qualifications for a reserve commission in the respective military departments shall, so long as there is a need for his services, be afforded an opportunity, pursuant to subsection 4(1)(4), Universal Military Training and Service Act, as amended, to volunteer for a period of active duty for not less than 24 months.

#First amendment (Ch 1, 5/16/73)

F. Medical officers who have not completed a one-year internship and who are engaged in such training will not be placed on active duty without their consent prior to completion of such training.

XI. INTERSERVICE TRANSFER

A. Pursuant to Section 3, Public Law 779, 81st Congress, as amended, officers holding commissions in the medical services may be transferred between the Armed Services, with their consent.

B. Application.

1. Method. Persons desiring transfer from the medical service of one department to the medical service of another department will initiate a letter to that effect which will include the following information:

(a) Applicant's last name, first name, and middle initial.
(b) Service number.
(c) Grade and corps.
(d) Component (regular, reserve, etc.).
(e) Organization to which assigned.
(f) Years, months and days of active federal commissioned service.
(g) Summary of prior interdepartmental transfer (if any).

(h) Brief statement of professional qualifications.

(i) Brief statement of reasons for requesting transfer.

(j) Complete medical examination.

2. Forwarding. The request for transfer will be forwarded to the department concerned through command channels and will be addressed as follows:

(a) To the Department of the Army --
The Adjutant General
Department of the Army
Washington 25, D.C.

(b) To the Department of the Navy --
Chief of Naval Personnel
Washington 25, D.C.

(c) To the Department of the Air Force --
Headquarters
United States Air Force
Deputy Chief of Staff
for Personnel
Attention: Director of
Military Personnel,
AFPMP-1-R
Washington 25, D.C.

3. All requests for transfer will be indorsed by both the parent and requested departments irrespective of their approval or disapproval in each case.

C. Action by Forwarding Indorsers. The immediate commander of the person

requesting transfer will indicate in his forwarding indorsement approval or disapproval as the case may be. Whenever the indorsement is one of disapproval the reasons therefor will be stated. Each succeeding indorser will include in his indorsement any pertinent information deemed appropriate.

D. Initial Action by Headquarters of the Parent Department. Upon receipt of a transfer to the medical service of another department, the parent department will determine whether or not final approval or disapproval will be accorded thereon. After such determination is made an indorsement to that effect will be prepared and all correspondence forwarded to the department where transfer is desired.

E. Action by Headquarters of the Requested Department. Upon receipt of the request for transfer from the Headquarters of the parent department the Headquarters of the requested department will take the following action:

1. Requests for Transfer Approved by Parent Department. Determination will be made of the acceptability for transfer of the person concerned. Records of the parent department required for this action will be available upon request. After such determination is made, an indorsement to that effect will be prepared

and all correspondence returned to the parent department.

2. Requests for Transfer Not Approved by Parent Department. These requests are forwarded to the requested department for informational purposes only. As soon as the requested department notes the action of the parent department, an indorsement to that effect will be prepared and all correspondence returned to the parent department.

F. Final Action by Headquarters of the Parent Department.

1. Requests for Transfer Approved by Both the Parent and Requested Departments. The Headquarters of the parent department will publish appropriate orders on those persons whose request for transfer is approved by both the parent and requested departments. All records or abstracts thereof pertaining to the officer transferred will be transferred to the gaining department.

2. Requests for Transfer Not Approved by Parent and/or Requested Department. The Headquarters of the parent department will return by appropriate indorsement through command channels the basis request for transfer to the person concerned.

XII. IMPLEMENTATION

Each military department shall take action to implement this instruction. Two copies of such implementing instructions shall be furnished to the Assistant Secretaries of Defense (Health and Medical) and (Manpower, Personnel and Reserve) within ninety (90) days of date of this instruction.

/s/ Frank B. Berry	/s/ Charles A
Assistant Scretary of Defense (Health and Medical)	Assistant Secretary of Defense (Manpower, Personnel and Reserve)

APPENDIX "B"

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 45-26

8 August 1975

Reserve Forces

VOLUNTARY ENTRY ON EXTENDED ACTIVE DUTY (EAD) OF COMMISSIONED OFFICERS OF THE RESERVE FORCES

This regulation states policies and tells how officers of the Air National Guard of the United States (ANGUS) and United States Fir Force Reserve (USAFR) enter on voluntary extended active duty. It does not apply to officers applying for active duty for training (ADT); active duty under 10 U.S.C. 265, 10 U.S.C. 678, 10 U.S.C. 8033, 10 U.S.C. 8496, or 32 U.S.C. 708; or to Air Force Officers' Training Corps (AFROTC) graduates for initial tour of EAD, except for grade in which ordered to active duty. It implements DOD Directive 1320.7, 7 August 1970, and DOD Instruction 1205.1, 27 September 1960.

Proposed supplements which affect any personnel function, performed at MAJCOM or below, will be processed per AFR 5-13.

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Supersedes AFR 45-26, 12 April 1973. (For summary of revised, deleted, or added material, see signature page.)
OPR: DPM (AFMPC/DPMMPO)
DISTRIBUTION: F

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SECTION A - GENERAL INFORMATION

1. Statutory Authority:

a. Voluntary Entry on EAD of Line of the Air Force Officers. Title 10 U.S.C. 672(d) or 10 U.S.C. 8444.

b. Medical and Dental Corps Officers. Title 50 U.S.C. App 454.

c. Graduates of AFROTC. Title 50 U.S.C. App 456.

d. Grade in Which Ordered to EAD. Title 10 U.S.C. 8202 or 10 U.S.C. 8494.

2. Terms Explained:

a. Career Reserve Officer. An officer of a reserve component who enters active duty voluntarily, or who later agrees to remain on active duty for an indefinite or unlimited period (AFR 36-14).

b. Extended Active Duty (EAD). A tour of active duty normally in excess of 90 days performed by a member of the Air Reserve Forces (ARF). Strength accountability for persons on EAC changes from the ARF to the active forces.

(Excludes active duty for training (ADT) and active duty in a service academy or armed forces preparatory school.)

c. Medical Service Officer. An officer of the Medical Corps, Dental Corps, Veterinary Corps, Nurse Corps, Medical Service Corps (MSC), or Biomedical Sciences Corps (BSC).

d. Noncareer Reserve Officer. A Reserve officer serving on active duty for a specified period of duty. (Does not include the 20-year Active Service Career for Reserve Officers Program.) (See AFR 36-14.)

e. Prior Service. Under this regulation, prior service means having previously served on EAD in commissioned status.

f. Promotion Eligibility Date (PED) for a Medical Corps Officer. [or Dental Corps Officers] The PED is computed in accordance with AFR 36-89, para 36.

g. Recall. Return to EAD of prior service officers.

3. Purpose of Voluntary Entry on EAD. ANGUS and USAFR officers are ordered to voluntary EAD to help meet active force requirements for trained career Reserve officers in certain grades and skills.

4. EAD Restrictions:

a. An officer is not ordered to EAD under this regulation:

(1) For trial by court-martial.

(2) To appear as a witness in a military trial.

(3) To complete a project left unfinished at the time of release from EAD.

(4) To correct an error committed during a previous tour of EAD.

(5) To appear before a physical evaluation board.

(6) Primarily to qualify for retirement or promotion benefits, or to increase retirement pay or benefirs under any provision of law.

(7) If pending termination action under directives pertaining to non-EAD personnel.

b. If an ANGUS officer is committed to serve a specified period with the Air National Buard (ANG) because of schooling or training paid from ANG appropriations, officer is not ordered to voluntary EAD until completion of that service, unless relieved of this commitment by appropriate authority.

c. Normally, entry on EAC is limited to officers in the grade of captain is desired, the specific age, skill, and other criteria will be announced.

5. Forms Used With This Regulation:

a. AF Form 24, Application for Appointment as Reserves of the Air Force or USA Without Component.

b. AF Form 90, Officer Career Objective Statement.

c. AF Form 125, Application for Extended Active Duty With the USAF.

d. SF 88, Report of Medical Examination.

e. SF 93, Report of Medical History.

SECTION B - RESPONSIBILITIES

6. HQ USAF:

a. The Personnel Plans Directorate, HQ USAF/DPX authorizes recall programs and provides related criteria.

b. The Career Management Division, Office of the Judge Advocate General, HQ USAF/JAEC selects and assigns judge advocates to fill active duty requirements.

7. Air Force Military Personnel Center (AFMPC):

a. The Officer Procurement Branch, AFMPC/DPMMPO:

(1) Announces recall programs.

(2) Provides the Air Reserve Personnel Center (ARPC) guidance in implementing programs.

(3) Selects Reserve line officers to fill active duty requirements. This authority may be delegated to ARPC.

(4) Provides ARPC with assignment instructions for Reserve line officers selected for entry on EAD.

(5) Notifies ARPC of officers considered but not selected for EAD.

b. The Officer Management Division, AFMPC/DPMRO, provides AFMPC/DPMMPO with assignment instructions for line officers selected for EAD. AFMPC/DPMMPO enters them into the active file through the Advanced Personnel Data System (APDS).

c. The Surgeon, AFMPC/SG:

(1) Selects and assigns Reserve medical service officers to fill active duty requirements.

(2) Determines temporary promotion service credit for officers initially appointed for assignment to the BSC (para 12), and nurses entered on EAD with a bachelor's degree (table 1, note 5).

(3) Convenes a board to consider requests from Reserve medical and dental officers ot their employers for delays or exemption from active duty.

d. The Command Chaplain's Office, AFMPC/HC, selects and assigns Reserve chaplains to fill active duty requirements.

8. ARPC. The Procurement Division, ARPC/DPRP:

a. Reviews the master personnel records (MPerR) of applicants and potentially eligible Reserve members to determine their eligibility for EAD.

b. Selects officers for EAD within procurement limitations and criteria provided by AFMPC/DPMMPO.

c. Retains for 1 year, applications from eligible officers whose entry on EAD cannot be approved for lack of requirements.

d. Publishes EAD orders for ANGUS and USAFR selectees.

SECTION C - ELIGIBILITY CRITERIA AND POLICY

9. Eligibility Criteria. To be eligible for EAD, an applicant must be an ARF officer and must:

a. Possess at least a baccalaureate degree, except that a nurse must be a graduate of a school of nursing that is accredited by a specialized professional accrediting association or agency recognized by the United States Commissioner of Education and be acceptable to the Surgeon General, USAF. A judge advocate applicant must have been awarded a law degree from an American Bar Association accredited law school, and be admitted to practice law before the bar of a Federal court or the highest court of a State.

b. Be able to qualify for retirement under 10 U.S.C. 8911 (active duty retirement) or 10 U.S.C. 1331 (Reserve retirement), before or on release from EAD. EXCEPTION: Not applicable to chaplains, physicians, and dentists (10 U.S.C. 8855). These officers who can earn retirement by age 60, but not before they complete 28 total years of service, may be called to EAD in a noncareer status. Selection for Career Reserve Status (CRS), after completion of at least 1 year of active duty (AFR 36-14), constitutes approval of retention (10 U.S.C. 8855) to qualify for active duty retirement unless active duty is terminated sooner under other directives. Additionally, with approval of the DCS/Personnel for military personnel, a physician or dentist who cannot earn retirement eligibility by age 60 may be voluntarily entered on EAD in a noncareer status provided the applicant acknowledges in writing that retention for retirement is not possible.

c. Be physically qualified for active service.

d. Be the subject of a favorable National Agency Check (NAC). ARPC insures that the NAC is updated before entry on EAD, if the initial assignment requires an immediate clearance, or if it would be in the best interests of the Air Force. For all other clearances, see AFR 205-32.

e. Agree to serve the period of EAD indicated in table 3 by completing the appropriate block on the AF Form 125.

f. Not be in a deferred status nor have been released from EAD under AFR 36-12, para 65, 67, 73, or 74. An officer who twice failed selection for promotion but was released from EAD under AFR 36-12, para 71, is ineligible.

10. Flying Status. Flying status is determined accordingly to AFM 35-13. Under AFM 35-13, paragraph 2-29d, ARPC suspends from flying status, any rated officer selected for return to EAD in a nonrated specialty.

11. Grade in Which Ordered to EAD. A Reserve officer is ordered to EAD in the permanent grade held on the effective date of entry on EAD, unless authorized a temporary or higher grade according to table 1.

12. Credit for Promotion to Temporary First Lieutenant and Captain, BSC. An officer initially appointed for assignment to the BSC is awarded temporary promotion service credit for education and professional experience, appropriate to the specialty to which assigned, to be applied toward appointment and promotion to the temporary grades of first lieutenant and captain. The maximum credit which may be awarded is 48 months.

a. Education must have been completed before entry on EAD as a commissioned officer, as evidenced by award of the appropriate degree.

b. Internship or appropriate experience must have been:

(1) Gained before entry on EAD as a commissioned officer.

(2) Full time in the professional specialty for which trained.

(3) Demonstrated by the individual's ability to perform at a level commensurate with training.

(4) Accrued after attaining the qualifying degree for the specialty concerned.

c. Temporary promotion service credit for education beyond the 4-year bachelor's degree

level is awarded only on the basis of an institution's standard academic program required for the award of a specific degree. Credit is not awarded for more than one degree. Credit for education is awarded according to table 2.

d. One month of temporary promotion service credit is awarded for each month of professional experience. No credit may be awarded for experience of less than 6 full months.

e. Temporary promotion service credit is awarded for full months (30 days) only.

13. Medical Examinations. An applicant must be medically qualified according to AFM 160-1 before ARPC may publish EAD orders.

a. Action by ARPC. When applicant is tentatively selected for EAD, ARPC advises applicant to obtain a medical examination and the actions which must be taken.

b. Action by Applicant. Applicant, when advised byARPC, must arrange for a medical examination, as follows:

(1) If on active duty in another status, arrange for the examination with the surgeon of the installation.

(2) If not on active duty, arrange to take the examination at an Air Force installation which has adequate facilities. If flying status is not involved, the examination may be taken at an Armed Forces Examining and Entrance Station, or an Army or Navy medical facility. (Travel at Government expense is not authorized.)

14. Length of EAD Tours. Table 3 shows the minimum length of EAD tours.

15. Policy on Entry on EAD of a Retired Officer:

a. The Air Force will not return to EAD:

(1) An officer who has been permanently retired for physical disability.

(2) Other officers permanently retired. (In rare and unusual cases, a waiver may be granted when a Retired Reserve officer is needed on EAD to fill a unique assignment which cannot be filled by an officer on active duty. The tour of duty must be limited to the shortest time needed to complete the specific assignment or to train an officer from the active force to perform it. Requests for recall of Retired Reserve line officers in the grade of colonel and below are submitted to AFMPC/DPMMPO, Randolph AFB TX 78148. Justification must be self-supporting. Requests which do not meet the above criteria are disapproved by AFMPC/DPMMPO. Other requests are processed for Secretarial determination.)

NOTE: Requests for retention of Regular officers beyond their mandatory retirement date are processed under AFM35-7, chap 4.

b. The Air Force may return to EAD Reserve officers being removed from the temporary disability retired list (TDRL) who have been found physically fit for worldwide assignment and have expressed a desire for return to EAD. Recall is contingent on the needs of the Air Force at the time of the officers' availability. Officers who were serving in a deferred status at the time their name was placed on the TDRL, normally are not returned to EAD.

NOTE: Return to EAD determinations on physically fit Regular officers desiring EAD upon removal from the TDRL are governed by 10 U.S.C. 1211.

SECTION D - APPLICATION PROCEDURES

16. Applying for Entry on EAD:

a. Since an applicant's selection for EAD is based on worldwide Air Force requirements, there is no assurance that, if selected, applicant will be assigned to any specific base, geographic area, or oversea station.

b. Table 4 specifies documents required for initial application for entry on EAD. (If application is for direct appointment with immediate entry on EAD and is made on AF Form 24, the AF Form 125 is not required.)

17. Submitting and Processing Applications. Table 5 outlines procedures for submitting and processing applications.

SECTION E - ORDERING OFFICERS TO EAD

18. Providing Administrative Clearances. The Commander, ARPC, and the Chief, National Guard Bureau (NGB), administratively clear all officers selected for EAD before publication of EAD orders. They assure that a thorough review of each officer's MPerR is made, and that the officer is qualified under this regulation before granting the clearance.

19. Publishing EAD Orders. Orders are published according to AFR 10-7. A Reserve officer being ordered to EAD is given at least 30 days advance notice unless this requirement has been waived in the appropriate section of the AF Form 125. Table 6 shows who publishes EAD orders.

20. Distributing EAD Orders. In addition to the distribution required by AFR 10-7, the orders' issuing activity sends one copy, along with one copy of the SF 88 to ARPC, 3800 York St., Denver CO 80205, for inclusion in member's MPerR.

21. Withdrawing Application or Declining EAD. The following policy applies for an applicant who is not otherwise obligated to serve on EAD and volunteers for EAD and subsequently desires to withdraw the application:

a. An officer may withdraw an application, without penalty, anytime before selection for entry on EAD.

b. An officer who has been selected for entry on EAD and is on an approved promotion list with an effective date of promotion after scheduled EAD date, may request postponement of the EAD date or may withdraw the application without penalty.

c. An officer who has been selected for entry on EAD may decline EAD within 14 days of notification of selection. However, officer may not be considered for voluntary entry on EAD for 1 year from the date of declination.

*d. An officer who has been selected for entry on EAD and has not declined under c above, may not withdraw an application except for an extreme personal hardship which did not exist at the time of notification of selection. The authority which approved entry on EAD may postpone or exempt entry on EAD, if approved authority is satisfied that the hardship is valid and that it did not exist at the time of notification of selection for entry on EAD, otherwise, the officer is subject to loss of commission under AFR 35-41, volume III, chapter 3.

22. Direct Communication. Direct communication is authorized between ARPC and MAJCOMs, including oversea commands, on matters pertaining to the EAD program.

23. Delays or Exemptions From EAD of Medical and Dental Officers. On receipt of active duty orders, any Reserve medical or dental officer or employer may submit a request for a delay in entrance on active duty or exemption from active duty to AFMPC/SG, Randolph AFB TX 78148. If disapproved, when the request is based on alleged community essentiality or hardship, the officer or employer may submit an appeal to the Secretary of the Air Force Personnel Council, Wash DC 20330, for a final determination. Such appeals are forwarded through AFMPC/SG, Randolph AFB TX 78148. ass see IMC 78-1

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BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

DAVID C. JONES,
General, USAF
Chief of Staff

JAMES J. SHEPARD, Colonel, USAF
Director of Administration

SUMMARY OF REVISED, DELETED, OR ADDED MATERIAL

This revision clarifies accreditation and degree requirements for nurse and JAG applicants (para 9a); provides for entry on EAD of Reserve chaplains, or appointment, in a higher temporary grade, if one was previously held (table 1, rule 1); changes grade criteria for physicians ordered to EAD (table 1, rules 6 and 7); provides for entry on EAD of dentists in a higher permanent grade if authorized (table 1, rule 10); revises length of tour criteria for physicians and dentists (table 3, rules 1 and 2); provides that JAG officers enter on EAD with a 4-year DOS (table 3, rule 15); adds requirement on submission of documents for JAG applicants (table 4, Rule 4); adds ATC/RSO as approval authority for entry on EAD of medical officers in grade of major and below (table 5, rule 5); and generally updates verbiage, references, and abbreviations for clarity.

MINIMUM YEARS OF ENTRY GRADE CREDIT

ENTRY GRADE	FY 78	FY 79	FY 80	FY 81	FY 82	Y BEYOND FY 82
04	9	9 1/2	10	10	10	10
05*	14	14 1/2	15	15 1/2	16	16
06*	21	21 1/2	22	22	22	22

* Persons can be awarded the requisite entry grade for 05 and 06 only with the permission of the secretary of the Air Force or his deisgnee, but only when a manning shortfall exists in these grades, or, in instances where gross inequities would otherwise result."

8. Paragraph 98, lines 2 and 3: Delete "or 10 U.S.C. 1331 (Reserve Retirement), before or on release from EAD." This change is effective immediately.

DISTRIBUTION: F

This is a printed copy of a message previously transmitted by the OPR.

R112000 Aug 77 IMC 77-1
FM HQ AFMPC AFR 45-26
RANDOLPH AFB TX/DPMMR 11 August 1977

UNCLAS EFTO B/ 365 /77

SUBJECT: Interim Message Change 77-1 to AFR 45-26, 8 August 1975.

This message in two parts. Part One. Paragraph 23 is changed by adding the following:

Criteria used to determine community essentiality is as follows:

a. The services performed by the physician are essential to the maintenance of the health, safety, or welfare of the community.

b. Removal of this physician from the community would result in an extreme shortage or elimination of an especially critical community service.

c. The service cannot be performed by other persons residing in the area concerned.

d. The physician cannot be replaced in the community by another physician who can perform such service within the time allotted by a postponement of entry on active duty.

e. The physician will be ruled not essential to a community where he or she has never practiced.

f. The needs of the civilian community must be balanced against the needs of the military service.

Part Two. The above change will be included in the next formal change to AFR 45-26. Action officer is Mr. W. S. Hoefelmeyer, HQ AFMPC/DPMMR, Autovon 487, extension 2102.

This is a printed copy of a message previously transmitted by the OPR.

R011900Z SEP 78 IMC 78-1
FM HQ AFMPC AFR 45-26
RANDOLPH AFB TX/MPCMR 1 SEP 78

UNCLAS EFTO B/ 412 /78

SUBJECT Interim Message Change 78-1 to AFR 45-26

This message in two parts.

Part One. Effective immediately, AFR 45-26, 8 Aug 75, as amended by Change 1, 15 Nov. 76, is further changed as follows:

Add to page 5, paragraph 23, "Officers of the Medical Service who have an obligation to serve on active duty as a result of receiving financial assistance from the Air Force for undergraduate or graduate school are not eligible to apply under this paragraph."

Part Two. The above change will be included in the next formal change to AFR 45-26. Action Officer is Mr. W. S. Hoefelmeyer, Hq AFMPC/ MPCMR, Autovon 487, Extension 2102.

DISTRIBUTION: F

No. 80-1048

In the Supreme Court of the United States

OCTOBER TERM, 1980

DAVID A. KARLIN, PETITIONER

v.

HANS M. MARK, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Washington, D.C. 20530
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TABLE OF AUTHORITIES

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Petitioner contends that the court of appeals erred in upholding the Secretary of the Air Force's denial of his request for a community hardship exemption from military service.

1. In 1970, petitioner was commissioned in the Air Force Reserve under the "Berry Plan,"[1] and accordingly his active

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[1]The Berry Plan is the common name for the Armed Forces Physicians' Appointment and Residency Program. Participation in this nonstatutory program is voluntary. Under the Berry Plan, medical interns who are subject to the draft may be given appointments in the military reserve and permitted to complete their residency training in exchange for agreeing to serve two years of active duty when their residency is completed. See 32 C.F.R. Part 58. Moreover, the Armed Forces will consider requests by Berry Plan doctors for further delay of active duty or exemption from duty.

duty obligation was deferred until the completion of his medical residency training. In 1976, prior to receiving active duty orders, petitioner attempted to resign his commission on the ground that he was conducting essential clinical research in cancer chemotherapy at the University of Chicago Medical School and Hospital. This resignation was treated by the Air Force as a request for deferment on "community essentiality" grounds, pursuant to Air Force Regulation 45-26, para. 23 (Aug. 8, 1975, as amended, Nov. 15, 1976), and Department of Defense Instruction No. 1205.1 (Sept. 27, 1960) (see Pet. 3-5). Concluding that the Air Force's need for petitioner's services outweighed the community need, the Air Force denied the request. Petitioner then sought habeas corpus relief in the United States District Court for the District of Colorado. The district court found that the community's need for petitioner's services outweighed that of the Air Force and it issued the writ. On appeal, the Tenth Circuit reversed, holding that the district court had applied an incorrect standard of review and that the Secretary's decision was not arbitrary. *Karlin* v. *Reed*, 584 F. 2d 365 (1978).

Shortly before the Tenth Circuit's decision, however, on September 1, 1978, petitioner abandoned his job at the University of Chicago and moved to a new position as a gastroenterologist/oncologist at the M.D. Anderson Hospital and Tumor Institute in Houston, Texas. On December 4, 1978, petitioner again sought to resign his commission on community essentiality grounds in light of his new position. On March 16, 1979, the Reserve Medical and Dental Officer Delay and/or Exemption from Active Duty Board denied the request, concluding that the Air Force's need for petitioner's services was greater than that of the community (Pet. App. 14a). The Board relied on information demonstrating the Air Force's urgent need for gastroenterologist/oncologists, particularly at Malcolm Grow USA Medical Center where the Air Force intended to assign petitioner

(*id.* at 15a n.1). This determination was adopted by the Secretary on appeal, and petitioner was ordered to active duty at Malcolm Grow.

Petitioner then filed this habeas corpus petition in the United States District Court for the Southern District of Texas. The court granted the writ (Pet. App. 3a-10a), finding that petitioner's "value to the M.D. Anderson facility and the medical community it serves unquestionably surpasses the value he would have in any other medical environment" (*id.* at 9a). The court of appeals reversed (*id.* at 11a-15a), ruling that the district court has disregarded the Air Force's needs and substituted its own conclusion for that of the Secretary. Because the record contained an adequate basis in fact for the Secretary's determination and that determination was not arbitrary, the court of appeals concluded that it should be upheld.

2. The court of appeals correctly applied the established standard of review of denials of applications for exemption from active duty by Berry Plan doctors on the grounds of community essentiality. These determinations by the Armed Forces may be overturned only if they are determined by the court to be arbitrary. See *Nicholson* v. *Brown*, 599 F. 2d 639 (5th Cir. 1979); *Karlin* v. *Reed*, 584 F. 2d 365 (10th Cir. 1978); *West* v. *Chafee*, 560 F. 2d 942 (8th Cir. 1977); *Roth* v. *Laird*, 446 F. 2d 855 (2d Cir. 1971).[2]

Petitioner presents the question "[w]hether the Due Process Clause requires reasons to be given for denial of administrative claims submitted to the Armed Forces and, if so, what is the test to be applied in such cases." But there can be no objection here that the Air Force violated a duty to

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[2]This test is sometimes couched in terms of whether there is any "basis in fact" in the record for the Secretary's determination. There is no practical difference between these formulations. See *Nicholson* v. *Brown*, *supra*, 599 F. 2d at 646-647 n.8.

disclose the reasons for the denial of petitioner's exemption request. As the court of appeals found (Pet. App. 14a-15a), the record clearly showed the basis for the Air Force's decision—the urgent need for gastroenterologists/oncologists in the Air Force and at Malcolm Grow. See *West* v. *Chafee, supra,* 560 F. 2d at 946.

Petitioner alleges (Pet. 8) that a conflict exists in the circuits "pertaining to Due Process of Law to be accorded to military personnel making administrative claims to the Armed Forces * * *." This contention is without merit. First, the cases cited by petitioner do not involve the denial of community essentiality exemptions. In any event, those cases do not authorize a court to substitute its judgment for that of the Secretary. The cases that have failed to uphold determinations by the Armed Forces did so because the record before the court was inadequate to provide a basis for determining whether the Secretary's determination was arbitrary. See, *e.g., Matlovich* v. *Secretary of the Air Force,* 591 F. 2d 852, 855 (D.C. Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981